NATALIA WASSILLIEY

IBLA 73-369 Decided October 29, 1974

Appeal from decision of Alaska State Office, BLM, rejecting Native allotment application AA 7191.

Set aside and remanded.

1. Alaska: Land Grants and Selections--Alaska: Native Allotments--Alaska: Statehood Act

   A selection filed by the State of Alaska under its Statehood Act segregates the land from all appropriations based on subsequent settlement and location. A native allotment application is properly rejected where occupation and use began after the filing of an acceptable state selection.

2. Alaska: Native Allotments--Words and Phrases

   "Substantial use and occupancy," as contemplated by the Alaska Native Allotment Act must be by a Native as an independent citizen for himself or the head of a household and not as a minor child occupying or using land in company with his parents.

3. Alaska: Native Allotments

   Where, on appeal, an allotment applicant asserts that use and occupancy was initiated prior to the segregation of land by a state selection, the decision will be set aside and the applicant will be allowed to demonstrate

> the application is entitled to further consideration; the applicant will be required to affirmatively establish his entitlement.

APPEARANCES: Natalia Wassilliey, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Appellant's Alaska Native allotment application was filed pursuant to 43 U.S.C. § 270-1 (1970) 1/ and the implementing regulations, 43 CFR 2561. The application recited that in 1965 the appellant had commenced to use the two parcels of land applied for and that she has continued to use the land since that date on a seasonal basis for fishing and berry picking from May to September. The Alaska State Office, Bureau of Land Management (BLM), rejected the application because of conflict with Alaska state selections filed on May 2, and May 8, 1961, pursuant to the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, as amended, 43 U.S.C. § 1617 (Supp. II, 1972). The decision stated that the State selections had segregated the lands, and they had not been open to settlement since May 2, 1961.

Appellant does not controvert or question that the land has been segregated since May 2, 1961. Instead, she asserts that she actually occupied and used the land in "traditional Native manner since 1955, first alongside her parents, then later on her own for berry picking and fishing." She stated that the 1965 date appearing on the application was an error.

[1] The BLM decision was wholly correct and proper in stating that a state selection segregates the land and closes it to subsequent location, including use and occupancy under the Allotment Act. Helen F. Smith, 15 IBLA 301 (1974); 43 CFR 2627.4(b).

An allotment may be made to one "who is the head of a family, or is 21 years of age." 43 U.S.C. § 270-1 (1970). Notwithstanding the statutory provisions it appears that some latent doubt lingered among applicants whether the qualifying "use and occupancy" may be initiated prior to the 21st birthday where the person is not the head of a household. The doubts were dispelled on October 18, 1973, when the Assistant Secretary of the Interior for Land and Water Resources, made it clear that the applicant:

1/ Repealed by Pub. L. 92-203, December 18, 1971, 85 Stat. 710, which preserved existing applications of record in this Department. Subject application presumably had been given to BIA before December 18, 1971.

> Must be the head of a family or 21 years of age only at the time the allotment is granted. Therefore, an applicant may be under 21 years of age or not the head of a family before or at the time his application was filed with the Department.

[2, 3] It seems that because of the ambiguities at an earlier time, applicants for Native allotments asserted commencement of use and occupancy at some time between the 20th and 21st birthday although actual use may have commenced years earlier. We do not know if such is the fact here. The record shows appellant was born on August 12, 1945, and attained age 21 in August 1966. If she used and occupied the land from a time prior to segregation by the state selection and still continues in her use and occupancy, she may qualify for an allotment. But her allegations on appeal do not unequivocally show that she did initiate her exclusive use of the land at an earlier period. Her assertion carefully refrains from stating that she used and occupied her land for herself prior to 1961. If she used the land alongside her parents or siblings, entitlement to allotment would not to be demonstrated because "use and occupancy must be substantial, actual possession and use of the land at least potentially exclusive of others and not merely intermittent use." 43 CFR 2561.0-5; United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841 (1948); United States v. State of Alaska, 201 F. Supp. 796 (1962). "Alongside her parents" does not fulfill the requirements "at least potentially exclusive of others." As this Board said in Arthur C. Nelson, 15 IBLA 76 (1974):

> Substantial use and occupancy, as contemplated by the Alaska Native Allotment Act . . . must be by the native as an independent citizen for himself or as head of a family, and not as a minor child occupying or using the land in company with his parents.

Appellant seeks an allotment to two parcels, embracing approximately 80 acres, and about 25 air miles distant from each other. Yet appellant implies that at the tender age of 10 she used and occupied these two parcels to the potential exclusion of all others. Resolving the ambiguities of the language in appellant's favor, it may be assumed that she intended to convey the meaning that she first used the land alongside her parents and gradually took over on her own and has since used it exclusively. If such is the case, the question for determination is whether and when appellant established use and occupancy of the two tracts to the potential exclusion of all others. Necessarily, such use and occupancy would have had to commence prior to the date of the state selection in 1960.

We believe appellant should be permitted to offer additional evidence with her application to remove all ambiguities and doubts. This must be accompanied by substantive, probative evidence to establish appellant's entitlement to an allotment. This accords with Secretarial mandate, BLM Manual procedures, and instructions.

Appellant will be permitted to offer additional evidence in support of her application. This will not be accepted unless a full clarifying statement is made and substantive evidence submitted to demonstrate her entitlement. Her evidence may be in the form of an affidavit in which she will be required to recite in her own words, her date of birth, names of her parents and siblings, the history of her use and occupancy, whether she is married or single; if married, the date of the ceremony, the address of her husband, whether her husband has applied for allotment, the number of his application, and whether she lived separately from her family during the period of asserted use of the two parcels. She will be required to explain the use and occupancy she makes of the two parcels, the frequency and her method of transportation between them. She may include in her statement further information to aid in adjudication of her claim. Appellant's statement must be corroborated. Witness' statements, preferably under oath, must fully identify the witnesses in relationship to appellant. Each witness must testify of his own actual knowledge concerning the period of time he has known appellant, when he first observed appellant on the land, and the use to which appellant puts the land as well as the period of occupancy on each parcel during each year. The witness should state whether the land is used or claimed by others and whether he had actual knowledge that the land was claimed by the applicant as a Native allotment. BLM may require such further information as it deems necessary.

This accords with the Secretarial Instruction of October 18, 1973:

> Amendments to Application
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> All amendments to allotment applications must be closely scrutinized. Amendments which result in the relocation of the allotment will not be accepted unless it appears that the original description arose from the inability to properly identify the site on protraction diagrams. Amendments which are designed to claim the commencement of the use and occupancy at an earlier point in time must also be carefully examined and the applicant must establish the reason for the error, his good faith in making the correction, and the applicant must present convincing evidence of the actual use and occupancy at the earlier point in time.

We do not make any ruling on whether the alleged occupancy prior to the filing of the allotment application would suffice to prevent third persons from acquiring rights to the land. The State of Alaska by its tentatively approved selection application has an adverse interest in the land, and copies of all further documents and proofs should be served upon the State. The State should be afforded an opportunity to set forth its position on whether the occupancy of the Native would be sufficient to prevent the State's selection rights from attaching to the land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is set aside and the case remanded for further processing in conformance herewith. BLM will notify appellant of the evidence required and the period in which it must be submitted, failing in which the application will be finally rejected.

Douglas E. Henriques
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Joan B. Thompson
Administrative Judge